1955

State of Utah v. Hugh Bailey : Brief of Defendant and Appellant

Utah Supreme Court

J. Vernon Erickson; Attorney for Defendant and Appellant;

In the Supreme Court
of the State of Utah

STATE OF UTAH,
Plaintiff and Respondent

vs.

HUGH BAILEY,
Defendant and Appellant

Criminal No. 8288

BRIEF OF DEFENDANT AND APPELLANT

Appeal from the District Court of the Sixth Judicial District in and for the County of Garfield, Honorable John L. Sevy Jr., Judge.

J. VERNON ERICKSON,
Attorney for Defendant and Appellant.

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INDEX

TABLE OF CASES

TEXTS

BRIEF OF DEFENDANT AND APPELLANT

The defendant by the Information in this action was charged with on or about September 17, 1953, at and within Garfield County, State of Utah, wilfully and unlawfully driving a motor vehicle, (a Jeep bearing Utah License for 1953 No. WA 762) northwesterly along U. S. Highway 89, about one mile east of Panguitch, Utah, while under the influence of intoxicating liquor, and by the Information Supplement with having been convicted of a similar offense on the 20th day of November, 1952, by a plea of guilty to the offense of having driven a motor vehicle on November 20, 1952, west on Utah Highway No. 12 just east of its Junction with U. S. Highway 89, at what is commonly called Bryce Junction in Panguitch Precinct, Garfield County, while under the influence of intoxicating liquor, said motor vehicle being one Ford Sedan bearing Utah License plates for 1952 No. 917 AH, which said act was contrary to the laws of Utah, 1949, Chapter 65, Section 57-7-11.

The action was tried in Garfield County, Utah, and the jury returned a verdict of finding Defendant guilty of driving a motor vehicle under the influence of intoxicating liquor as charged in the Information, and the Court found the defendant guilty of the count in the Information Supplement, from which verdict of the jury and decision by the Court the defendant appeals.

STATEMENT OF FACTS

The testimony of Armond A. Luke, Highway Patrolman, was that he first saw the defendant at about 8 P. M. on the night of September 17, 1953, at a place called "Mill Hill or Roller Mill Hill" east of Panguitch in a jeep stopped in the middle of the road. He passed the jeep going in the opposite direction, then went to the top of the hill and turned and came back as the jeep was starting down the road. He claims the defendant, Hugh Bailey was driving and was in an intoxicated condition. (T. 4 and 5). He took the defendant Bailey and his companion, Garn Wilcox in to Panguitch where he tried to get defendant to submit to a blood test which defendant refused. After contacting the Mayor of Panguitch and the Town Marshal, the two men were placed in the County Jail at Panguitch.

Both the defendant, Hugh Bailey, and the witness Garn Wilcox testified that Garn Wilcox was the driver of the jeep which was in Wilcox's charge as an employee of the owner, Rex Whittaker. Garn Wilcox admitted having drunk some whiskey out of a bottle in the car, but the defendant Bailey denied he had drunk anything except two cans of beer before leaving Escalante. (T. 42 to 44 and 53 and 56).

After the jury had returned a verdict of guilty to the offense charged in the Information, the jury was discharged and counsel stipulated that the evidence to be presented with regard to the prior conviction could be heard before the Court. Accordingly the Justice of the Peace, Harry Delong was called as a witness who testified that the Justice's Docket of former Justice of the Peace, Orian Salisbury who was then deceased, as shown to him, was the Justice's Docket of the former Justice of the Peace, Orian Salisbury, which was turned to the witness when he took office.

(T p 65). It was stipulated by defendant's counsel that the Justice of the Peace, Orian Salisbury wrote himself in his own handwriting the information which is in the docket on page 234 in the matter of the State of Utah vs. Hugh Bailey. (T 67). No mention of what this information or entry consisted of was introduced, or read into the record and the docket was not introduced as an exhibit.

STATEMENT OF POINTS

POINT 1. THAT THE STATE FAILED TO PROVE VENUE AND THEREFORE THE VERDICT OF THE JURY IS CONTRARY TO THE EVIDENCE AND THE COURT ERRED IN DENYING DEFENDANT'S MOTION FOR ARREST OF JUDGMENT.

POINT II. THAT NO PROOF OF A PRIOR CONVICTION WAS INTRODUCED AND THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE JUDGMENT OF THE COURT ON THE INFORMATION SUPPLEMENT.

POINT III. THAT THE TRIAL COURT COMMITTED ERROR IN DENYING DEFENDANT'S MOTION FOR A NEW TRIAL.

ARGUMENT

POINT I. THAT THE STATE FAILED TO PROVE VENUE AND THEREFORE THE VERDICT OF THE JURY IS CONTRARY TO THE EVIDENCE AND THE COURT ERRED IN DENYING DEFENDANT'S MOTION FOR ARREST OF JUDGMENT.

The Information charged the defendant with the crime of driving a motor vehicle on the public highway while under the influence of intoxicating liquor, in violation of the Utah Code Annotated, 1953, Section 41-6-44, the charging part of the Information reading as follows:

> "That the said Defendant, on or about the 17th day of September 1953, at and within Garfield County, State of Utah, did wilfully and unlawfully drive a motor vehicle, namely a jeep, bearing Utah License for 1953 No. WA 762, northwesterly along U. S. Highway 89, about one mile east of Panguitch, Utah, while under the influence of intoxicating liquor."

It is the contention of the defendant and appellant that the venue of this case as charged in the Information was never sufficiently proved or shown by the State. There is nothing in the record to show that the place where the crime was committed was in Garfield County, Utah, or one mile east of Panguitch, or on Highway 89 as alleged in the Information. The only testimony as to the place of the alleged commission of the offense was that given by Armond A. Luke, the Highway Patrolman who said he first saw the defendant at Roller Mill Hill east of Panguitch (T p 4). There are other references that Roller Mill Hill was the place where Mr. Luke contacted the defendant and his companion, but no evidence was ever introduced to show that Roller Mill Hill was about 1 mile east of Panguitch, was on Highway No. 89, or that it was in fact in Garfield County.

The Court in his Instruction No. 5 to the Jury instructed the jury that before they could find the defendant guilty as charged, they must find:

1. That on or about the 17th day of September, 1953, the defendant, Hugh Bailey, drove a motor vehicle, to-wit: a Jeep, while under the influence of intoxicating liquor.

2. That said driving occurred in Garfield County, Utah, on Highway 89 about one mile east of Panguitch, Utah, in said county.

It is not enough that one or more of these elements be proved, but all of said elements must be proved to your satisfaction beyond a reasonable doubt from the evidence in the case.

Volume 42 Corpus Juris Secundum, Sec. 245, page 1263, in discussing general rules in Indictments and Informations says:

> "Place. In the absence of a contrary statute, an averment of venue must be proved, and even an unnecessary allegation of place descriptive of the offense must be proved."

citing numerous cases among which are People v. Ware, 226 P. 956, 67 Cal. App. 81, State vs. Rigby, 240 P. 859, 41 Idaho 570—State v. Siepert, 225 P. 135, 38 Idaho 20 and others.

It is a cardinal principle of law that all of the essential allegations of the charge must be proved as alleged, but in the case at bar the State wholly failed to prove the place of the alleged commission of the offense as specifically charged in the Information. Accordingly at the close of the trial the defendant's counsel made a motion to arrest the judgment for the reason that venue had not been proved, which was denied by the Court and which defendant charges was error by the Court.

POINT II. THAT NO PROOF OF A PRIOR CONVICTION WAS INTRODUCED AND THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE JUDGMENT OF THE COURT ON THE INFORMATION SUPPLEMENT.

A book purporting to be the Justice's Docket of the former Justice of the Peace was identified as the Docket of the former Justice of the Peace, but no record of any prior conviction was read into the record or introduced in evidence. The Information Supplement charges that a plea of guilty was made by defendant on a prior conviction for a similar offense, but such record was never introduced in evidence in this case. The defendant was never called upon to testify as to whether he had been convicted by reason of a plea of guilty to a similar offense, and the judgment of the Court and sentence was never shown. Therefore defendant contends that there was insufficient facts and evidence before the Court to sustain his judgment on the Information Supplement.

POINT III. THAT THE TRIAL COURT COMMITTED ERROR IN DENYING DEFENDANT'S MOTION FOR A NEW TRIAL.

Defendant asserts that for all the reasons set forth above, the lower Court committed error in denying his Motion for a New Trial, and that for the reasons submitted herein the verdict of the Jury and the decision of the trial court should be reversed.

Respectfully submitted,

J. VERNON ERICKSON.